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MICHAEL RODAK, JR., CLER

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-345

R. J. REYNOLDS TOBACCO COMPANY, *et al.*,

Petitioners,

v.

AMERICAN PRESIDENT LINES, LTD., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENTS WALTER KIDDE & COMPANY, INC. AND UNITED STATES LINES, INC.

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TABLE OF CONTENTS

	PAGE
Preliminary Statement	2
The Reasons for Granting the Petition	3
Conclusion	6

List of Authorities

Cases

American Mail Lines, Ltd., et al. v. *Federal Maritime Comm'n, et al.*, 8S.R.R. 21,077, 1974-2 Trade Cas. ¶75,140 (D.C. Cir. 1974) ..... 1 fn, 4

Federal Maritime Comm'n v. *Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968) ..... 5 fn

Federal Maritime Comm'n v. *Seatrain Lines, Inc.*, 411 U.S. 726 (1973) 2, 3, 4, 5, 6

Greater Baton Rouge Port Comm'n v. *United States*, 287 F.2d 86, *reh'g denied*, 293 F.2d 959 (5th Cir. 1961), *cert. denied* 368 U.S. 985 (1962) 5 fn

Marine Space Enclosures v. *Federal Maritime Comm'n*, 420 F.2d 577 (D.C. Cir. 1969) ..... 5 fn

Matson Navigation Co. v. *Federal Maritime Comm'n*, 405 F.2d 796 (9 Cir. 1968) ..... 5 fn

NLRB v. *Waterman S.S. Corp.*, 309 U.S. 206 (1940) 6

Schlude v. *Commissioner*, 372 U.S. 128 (1963) 3

SEC v. *Chenery Corp.*, 318 U.S. 80 (1942) 6

PAGE

St. Louis, K.C. & C.R. Co. v. *Wabash R. Co.*, 217 U.S. 247 (1910) 6

Volgswagenwerk Aktiegesellschaft v. *Federal Maritime Comm'n*, 390 U.S. 261 (1968) ..... 5 fn

Wilkinson v. *United States*, 365 U.S. 399 (1961) .. 3

Statute

46 U.S.C. §814 .....2 fn, 5 fn

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Respondents Walter Kidde & Co., Inc. and United States Lines, Inc. ("Kidde/USL") submit this Brief in Response to the Petition of R. J. Reynolds Tobacco Company, *et al.* ("Reynolds") for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit. Kidde/USL concur with and support the position of Reynolds as expressed in its Petition, and for those reasons, we respectfully urge the Court to grant that Petition and review the judgment of the Court of Appeals.[1]

[1] The Court of Appeals' opinion in *American Mail Lines, Ltd., et al.* v. *Federal Maritime Comm'n, et al.*, Nos. 73-1252, 73-1334, 73-1395 and 73-1400, is reprinted as Appendix A to the Reynolds' Petition. It is unofficially reported at 8S.R.R. 21,077 and at 1974-2 Trade Cas. ¶75,140 (D.C. Cir. 1974). Citations herein to the opinion below refer to the appropriate page of Reynolds' Appendix, *e.g.* "App. ——."

Preliminary Statement

The nature of this case, the opinions below and the questions presented for review are amply and accurately set forth in Reynolds' Petition and need not be repeated here. Briefly stated, the Court of Appeals held that the Federal Maritime Commission lacks jurisdiction, under Section 15 of the Shipping Act of 1916,[2] over *any* acquisition agreement between common carriers by water, regardless of the on-going nature of such an agreement. Kidde/USL respectfully submit that in reaching its decision, the lower court misapplied this Court's ruling in *Federal Maritime Comm'n* v. *Seatrain Lines, Inc.*, 411 U.S. 726 (1973), and in so doing left in its wake a patchwork of statutory conflict which urgently requires resolution. Accordingly, the Petition for certiorari should, we submit, be granted.

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[2] 46 U.S.C. §814, which provides, in pertinent part, that:

> Every common carrier by water, or other person subject to this chapter, shall file with the Commission a true copy . . . of every agreement with another such carrier or other person subject to this chapter . . . controlling, regulating, preventing or destroying competition; . . . or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.
>
> The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement . . . [that it finds] to operate to the detriment of the commerce of the United States or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications or cancellations.
>
> * * *
>
> Every agreement, modification, or cancellation lawful under this section . . . shall be excepted from the provisions of Sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto. . . .

The Reasons for Granting the Petition

As set forth in the Reynolds' Petition (see particularly pages 8-13), the decision of the court below conflicts with this Court's ruling in *Federal Maritime Comm'n* v. *Seatrain Lines, Inc., supra,* in that the lower court held that the Federal Maritime Commission lacks jurisdiction under Section 15 to approve an acquisition agreement between water carriers, even where, as here, the agreement imposes substantial on-going rights and responsibilities upon the parties. Thus, on this ground alone, we submit that certiorari should be granted to rectify the Court of Appeals' misapplication of a prior decision of this Court. *See, e.g., Schlude* v. *Commissioner,* 372 U.S. 128 (1963); *Wilkinson* v. *United States,* 365 U.S. 399 (1961).

The *Seatrain* case involved the sale by Oceanic Steamship Co. of all its assets to Pacific Far East Lines, Inc. While under that agreement "Oceanic undertook no continuing obligation . . ." 411 U.S. at 730 and the merger was therefore a discrete event, the parties nonetheless contended that the acquisition was an "agreement" subject to FMC jurisdiction under Section 15. This Court rejected the *Seatrain* parties' generic definition of "agreement," on the narrow premise that Congress did not intend to give the FMC jurisdiction to regulate transactions which, by their very nature, left nothing to be regulated after their consummation.[3] However, the Court was careful to leave intact the fundamental concept that where an acquisition agreement between common carriers by water is on-going in nature, it is subject to the Com-

[3] Indeed, Mr. Justice Marshall described the issue presented in *Seatrain* as:

> whether a contract which calls for the acquisition of all the assets of one carrier by another carrier *and* which creates no ongoing obligation is an "agreement" within the meaning of [Section 15]. 411 U.S. at 728 (emphasis supplied).

mission's jurisdiction. Thus, the rationale of the *Seatrain* holding is aptly synopsized by the following portion of the Court's opinion:

> The Statute thus envisions a continuing supervisory role for the Commission and invests it with power to disallow an agreement after a period of time even though it had initially been permitted. But it is hard to see how the Commission can exercise this supervisory function when there are no continuing obligations to supervise. *Federal Maritime Comm'n* v. *Seatrain Lines, supra,* at 735.

In this case, the Court of Appeals stands *Seatrain* on its head by holding the instant acquisition agreement to be beyond FMC jurisdiction despite the continuing nature of this transaction. In fact, the lower court virtually disregarded the on-going aspects of this acquisition and instead predicated its decision on the finding "that the merger is a substantial and principal feature of the transaction," *American Mail Lines, Ltd.* v. *Federal Maritime Comm'n, supra,* at App. 20a.[4] This holding, we submit, is in direct contravention of *Seatrain* and should be corrected.

Moreover, the Court of Appeals' decision has had the resultant unfortunate effect of disengaging the delicate "interface between the antitrust laws and the Commission's regulatory powers" which this Court previously established. See *Federal Maritime Comm'n* v. *Seatrain Lines, supra,* at 729. Accordingly, it is essential that this Court restore clarity to the legal framework of national maritime commerce, which has been upset by the decision below.

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[4] The Court of Appeals, quoting its own language in its *Seatrain* opinion, held that mergers "effectively destroy[ ] one of the parties to the acquisition" *American Mail Lines, Ltd.* v. *Federal Maritime Comm'n, supra,* at App. 18a. However, since the acquisition agreement here *requires* the continued existence of both parties, we submit that the standard applied by the court below was clearly erroneous. *See* Report of the Federal Maritime Comm'n, Appendix B to Petition of R. J. Reynolds, at 162b-166b.

The matter of where administrative regulation ends and antitrust scrutiny begins is one of crucial importance, as this Court recognized in *Seatrain*. First, Section 15 imposes substantial fines for the failure to file promptly with the FMC an agreement that is subject to its jurisdiction.[5] On the other hand, if an agreement is filed that is later held to have been beyond the Commission's jurisdiction, the parties and the agency will have been put to the unnecessary expense and effort of conducting moot proceedings.[6] Moreover, once an agreement has been approved by the Commission, under the D.C. Circuit's opinion, the parties could never be assured of the effect of such approval. Thus, longstanding, on-going arrangements which have been approved by the FMC would nonetheless remain subject to the perpetual threat of potential antitrust actions by plaintiffs both public and private.

Kidde/USL believe that this imbalance is inconsistent with the "discrete event" standard of the *Seatrain* case. Yet, once the *Seatrain* test is discarded the boundary line becomes totally obscured. The effect of the Court of Appeals' decision assuredly is to remove from FMC scrutiny many agreements, such as the one at issue here, which are clearly on-going in nature. The myriad recent case law concerning the Commission's jurisdiction under Section 15[7] bears witness to the importance of resolving

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[5] 46 U.S.C. §814 provides, in the last paragraph thereof, for a fine of $1,000.00 for each day that a violation of the section continues.

[6] Also, since the effect of the Court of Appeals' decision may be to substitute a pure antitrust standard for the Commission's broader "public interest" test, the Commission's responsibility to balance maritime needs with antitrust considerations is cast into question by the decision below (see *Volkswagenwerk Aktiegesellschaft* v. *Federal Maritime Comm'n*, 390 U.S. 261 (1968); *Federal Maritime Comm'n* v. *Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968)).

[7] Including the *Seatrain*, *Volkswagenwerk* and *Svenska* cases, all *supra*, as well as, for example, *Marine Space Enclosures* v. *Federal Maritime Comm'n*, 420 F.2d 577 (D.C. Cir. 1969); *Matson Navigation Co.* v. *Federal Maritime Comm'n*, 405 F.2d 796 (9 Cir. 1968); and *Greater Baton Rouge Port Comm'n* v. *United States*, 287 F.2d 86, *reh'g denied*, 293 F.2d 959 (5th Cir. 1961), *cert. denied* 368 U.S. 985 (1962).

this issue promptly. This Court has often and traditionally granted certiorari in such instances. *See, e.g., Federal Maritime Comm'n* v. *Seatrain Lines, supra,* at 729; *SEC* v. *Chenery Corp.*, 318 U.S. 80, 81 (1942); *NLRB* v. *Waterman S.S. Corp.*, 309 U.S. 206, 209 (1940); *St. Louis, K.C. & C. R. Co.* v. *Wabash R. Co.*, 217 U.S. 247, 251 (1910). We submit it should do so here.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition of *R. J. Reynolds Tobacco Company, et al.*, Kidde/*USL* respectfully submit that the requested Writ of Certiorari to the Court of Appeals for the District of Columbia Circuit, should be granted.

Dated: New York, New York
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Respectfully submitted,

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